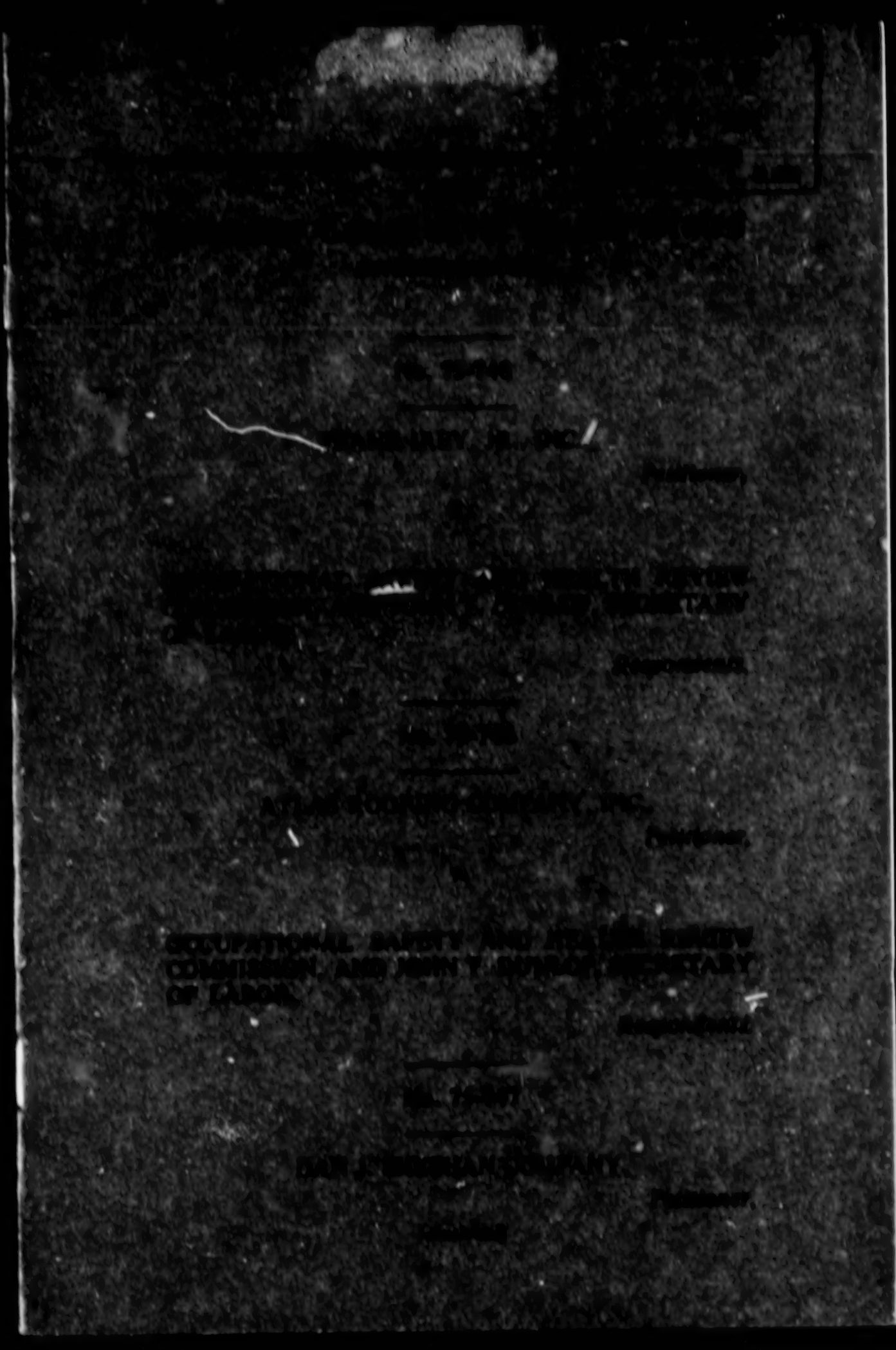

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

PETITIONERS' REPLY MEMORANDUM

McNEILL STOKES
Stokes & Shapiro
3920 First National Bank Tower
Atlanta, Georgia 30303

HERBERT J. MILLER, JR.
NATHAN LEWIN
MARTIN D. MINSKER
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037

Counsel for Petitioners

OLIVER N. HORMELL
423 Third Street
California, Pennsylvania 15419

Counsel for Petitioner, No. 75-748

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-748

FRANK IREY, JR., INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

No. 75-746

ATLAS ROOFING COMPANY, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

No. 75-747

DAN J. SHEEHAN COMPANY,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

PETITIONERS' REPLY MEMORANDUM

In their reply to our petitions in these cases, the respondents have taken the position, *inter alia*, that if Congress denominates a particular remedy as civil, that ends the matter, and the protections of the Sixth Amendment simply do not apply. Similarly, the respondents argue that if Congress elects to assign a particular remedy to an administrative agency rather than to a court, that ends the matter, and the Seventh Amendment right to jury trial is not applicable. This mechanical approach to the difficult constitutional arguments raised by these cases elevates form over substance.[1]

[1] Compare *United States v. LeBeouf Brothers Towing Co., Inc.*, 337 F. Supp. 558, 563 (E.D. La. 1974) *appeal pending United States v. LeBeouf Brothers Towing Co., Inc.*, No. 74-3140 (5th Cir.) [Hereinafter cited as *LeBeouf*]:

> At first blush, the paragraph here in question [33 U.S.C. § 1161(b)5, of the Federal Water Pollution Control Act] appears to be nonpenal, especially in view of the purported "civil penalty" that is assessed for the proscribed activity. But to be guided in the interpretive process by such superficial implements as word classification or legal jargon truly would be an analytical pitfall in allowing form

(continued)

1. In response to our argument that in OSHA Congress created criminal penalties clothed in civil dress, the respondents answer that nomenclature must control. They state baldly that "the status of monetary sanctions is a matter of statutory construction and congressional intent . . . ." Opp. Br., No. 75-748, at 10. On this reading, to take an extreme case, Congress could create a "civil penalty" for murder, and provide that the penalty could be imposed without any of the protections guaranteed to criminal defendants by the Sixth Amendment. (*Cf. LeBoeuf, supra*, 377 F. Supp. at 563). Contrary to the respondents' assertion, this Court has not adopted this formalistic view, but has instead emphasized the responsibility of the judiciary to look behind the label in order to determine whether a remedy is truly criminal in nature and effect. In *Trop v. Dulles*, 356 U.S. 86 (1958), the Court considered the same question—whether a particular statute was penal in nature. Noting that "surely form cannot provide the answer to this inquiry," *id.* at 95, the Court rejected the Government's argument that the statute should be considered non-penal because the drafters had not intended to create a criminal statute. See also *Boyd v. United States*, 116 U.S. 616, 633-35 (1886); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144

(footnote continued from preceding page)

> to replace substance. Chief Justice Warren, speaking for the Court in *Trop v. Dulles* . . . recognized the patent inadequacy of such an approach when he remarked: 'How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of labels pasted on them . . .' The real nature and intended objective of a statute must be unearthed to avoid Swiftian-like deceit . . . .

(1963); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 695 (1965); *United States v. U.S. Coin & Currency*, 401 U.S. 715, 718 (1971).

In *Kennedy v. Mendoza-Martinez, supra*, the Court outlined the various factors that should determine whether a particular statute is criminal rather than civil. We analyzed each of these factors in detail at pp. 12-17 of our petition in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, No. 75-846. In answer, the respondents have simply asserted that the OSHA penalties: (1) are not disabilities; (2) are not punitive; (3) do not require a showing of scienter; (4) are remedial in nature; and (5) are not excessive. These naked assertions do not withstand even the most cursory analysis.

The potential penalty under OSHA is as great as $10,000, a sum that is typically the maximum fine in serious offenses under Title 18 of the U.S. Code. The penalty, moreover, is plainly punitive rather than remedial. Unlike back-pay awards or other remedial measures, the OSHA penalty does not go to the injured party but to the U.S. Treasury, just as does any other fine.[2] The respondents' next assertion—that proof of scienter is not required—is flatly wrong. Under the statute, the penalty for willful or serious violations cannot be assessed without proof of either willfulness or negligence. Finally, the legislative history of OSHA suggests that Congress intended to create a punitive remedy, and that it sought to do so without affording

[2]Nor is the OSHA penalty "addressed to any . . . direct fiscal restitution" for the Government. *Cf., LeBeouf, supra*, 377 F. Supp. 568.

employers the rights guaranteed to criminal defendants under the Fifth and Sixth Amendments. See pp. 16-17 of our Petition in *Atlas Roofing Company, Inc. v. OSHRC*, No. 75-746. This Court must not accept the premise whereby, in essence, the availability of constitutional protections turns on the pleasure of Congress.

2. Much the same response can be made to the respondents' claim that the Seventh Amendment right to jury trial is not available here. Again, the respondents ask this Court to look no farther than Congress' determination to "entrust enforcement of a statute, including the imposition of monetary penalties . . . to an administrative tribunal." Opp. Br., No. 75-748, at 13. Yet if Congress sought to entrust monetary penalty actions to a District Court, with no right to a jury trial, this Court would be quick to find that procedure unconstitutional. Can Congress be permitted to achieve the same end simply by assigning the penalty suit to a tribunal that is denominated "administrative" rather than "judicial"? The cases relied upon by the respondents do not support this surprising proposition. As we noted in our petition, the case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1938), stands for two far narrower principles—that the equitable remedy of back pay can be granted without a jury, and that the Seventh Amendment does not apply to actions of a sort unknown at common law. See *Curtis v. Loether*, 415 U.S. 189, 194 (1974). However, a civil penalty or forfeiture action was well known at common law, and a civil penalty has long been recognized to be a legal, rather than equitable, remedy.

The cases of *Block v. Hirsch*, 256 U.S. 135 (1921), and *Pernell v. Southall Realty*, 416 U.S. 363 (1974),

provide no more support for the respondents' position. The *Block* case was founded on the premise that the landlord-tenant relationship necessarily involves remedies foreign to "suits at common law," and in *Pernell* the Court simply accepted, *arguendo*, the same premise that underlay the decision in *Block*. Finally, the recent case of *National Independent Coal Operators' Ass'n v. Kleppe*, 44 U.S.L.W. 4105, (No. 73-2066, Jan. 26, 1976), provides no support whatsoever for the respondents' position, since the statute at issue in that case provided that civil penalty actions must be brought in the District Courts, where a jury trial would be available upon demand.[3] *Id.*, 44 U.S.L.W. 4108; see *Hepner v. United States*, 213 U.S. 103 (1909); *United States v. J.B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974).

3. The respondents conclude their argument in the *Irey* case, No. 75-748, by disputing our point that OSHA marks an extraordinary departure from prior administrative statutes. *See* Opp. Br., No. 75-748, at 15 and n.8. Yet, as we pointed out in our petition, courts and commentators have remarked repeatedly on the novelty of the OSHA scheme. *See, e.g., Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 687 (N.D. Ga.), *aff'd*, 409 U.S. 1070 (1972); *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990 (5th Cir. 1975); Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, Report to the Administrative Conference of the United States, 900 (1972).

[3]The relevance of the case of *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917), to our Seventh Amendment claim is indecipherable. That case, cited in footnote 7 of the respondents' brief, was a Fourteenth Amendment challenge to a state statute, and the Seventh Amendment had nothing at all to do with the matter.

In footnote 8 of their brief, the respondents cite several statutes that they suggest are similar to OSHA in their penalty provisions. The cited statutes, however, are in large measure inapposite. The penalty provisions of the Immigration and Naturalization Act have been upheld specifically on the narrow ground of Congress' extraordinary authority over matters of immigration. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909). And several of the other cited statutes either explicitly or implicitly require that the action for recovery of the civil penalty be brought in District Court. *E.g.*, 40 U.S.C. § 1678(b) (Natural Gas Pipeline Safety Act); 12 U.S.C. § § 1425a(d); 1425b (Federal Home Loan Bank Board). Indeed, in the case of one of the statutes cited, the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 819, the Solicitor General has recently taken the position before this Court that the Act provides for a trial *de novo* in the District Court on both the factual basis of the violation and the amount of the penalty. See *National Independent Coal Operators Ass'n v. Kleppe, supra*, 44 U.S.L.W., at 4107 n.3.

In this regard, one statute *not* mentioned by respondents is the penalty provision of the Federal Water Pollution Control Act, 33 U.S.C. § 1161(b)5, which the *LeBeouf* Court found to be a criminal penalty despite its denomination as "civil". *See LeBoeuf* at 377 F. Supp. 568. The Government, in its Reply Brief in the appeal to the Fifth Circuit in *LeBeouf* tendered the following argument (*United States v. LeBeouf Brothers Towing Co., Inc.*, No. 74-3140, 5th Cir., Reply Brief for Appellant United States, p. 5, footnotes omitted):

The Third Circuit in *Irey* was troubled by the fact that penalties were imposed administratively, with substantial evidence review in the court of appeals the sole avenue for judicial challenge of the administrative determination, but affirmed the validity of the statutory scheme nonetheless (Slip opinion p. 9). In the instant appeals, the spillers had *de novo* trials in the district court, so the problem does not arise. Indeed, in light of the fact that OSHA penalties are imposed administratively with only substantial evidence review, and there is no provision requiring funds collected as penalties be used to further enforcement, a holding that OSHA is civil and remedial ought to apply *a fortiori* to the FWPCA and the Rivers and Harbors Act.

The converse of this argument would appear to be correct: *i.e.*, if *LeBoeuf* were correctly decided, the Third Circuit's *Irey* decision (and the Fifth Circuit's decision in *Atlas*) are wrong *a fortiori*.

In sum, the respondents' effort to pass OSHA off as a routine administrative statute in a long line of similar Acts does not survive even the most cursory examination of this extraordinary statute. A three-judge federal court recently commented on the breadth of the statute in the course of holding that the Fourth Amendment barred the Secretary of Labor from conducting warrantless administrative searches under the authority of OSHA. *Brennan v. Gibson's Products, Inc.*, No. S-75-5-CA (E.D. Tex. Jan. 28, 1976), opinion at 12. The Court there properly declined the invitation to defer to Congress and held that "the inspection provisions of OSHA amount to . . . an attempt at a broad partial repeal of the fourth amendment as is beyond the powers of Congress." *Id.* at 5. The same approach is appropriate with regard to the Fifth, Sixth

and Seventh Amendment claims raised in this case. OSHA is a pervasive regulatory statute placing unprecedented authority in administrative officers over businesses in every sector of the economy, and this Court must determine how far Congress can go, when drafting such a statute, in abolishing constitutional protections by the magic of nomenclature. The petitions for a writ of certiorari should be granted.

Respectfully submitted,

McNEILL STOKES
Stokes & Shapiro
3920 First National Bank Tower
Atlanta, Georgia 30303

HERBERT J. MILLER, JR.
NATHAN LEWIN
MARTIN D. MINSKER
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037

OLIVER N. HORMELL
Third Street
California, Pennsylvania 15419